IN THE

Supreme Court of the United States

October Term, 1977

No. 77-788

THOMAS E. COLE, DIANE C. BAKER,
AND BURNCO, INCORPORATED
Petitioners,

VS.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE

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Petitioners, Thomas E. Cole, Diane C. Baker and Burnco, Incorporated, pray that writ of certiorari issue to review the judgments of the Court of Criminal Appeals of the State of Tennessee at Knoxville, Tennessee, entered in this cause on July 1, 1977, and that on hearing the judgments of conviction be reversed.

OPINIONS BELOW

1. The written opinion of the Court of Criminal Appeals of the State of Tennessee issued on July 1, 1977, is unreported, but a copy of said opinion is appended to this petition.

2. On September 6, 1977, the Supreme Court of the State of Tennessee, without a written opinion, denied application for a writ of certiorari to review said judgments.

JURISDICTION

The judgments of the Court of Criminal Appeals of the State of Tennessee following appeal from petitioners' convictions were entered on July 1, 1977, at Knoxville, Tennessee. On September 6, 1977, the Supreme Court of the State of Tennessee, without a written opinion, denied application for a writ of certiorari to review said judgments. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

QUESTIONS PRESENTED

1. Whether petitioners were deprived of due process of law, guaranteed to them under the Fourteenth Amendment, where they were convicted of obtaining and attempting to obtain money under false pretenses upon proof which failed to establish the necessary elements of the statutory offenses charged, and where their convictions were the product of blatant appeals by the prosecuting attorney to prejudices against abortion and to prejudices against decisions of the United States Supreme Court relating to abortions.

2. Whether petitioners' rights of confrontation, guaranteed under the Sixth and Fourteenth Amendments, were violated by admitting into evidence the extrajudicial declaration of a doctor employed to perform abortions in the petitioner clinic. An undercover police woman, who was not pregnant, testified that the doctor, while performing a pelvic examination upon her, represented to her that she was pregnant. Under the State's theory in the case, the declarant doctor was necessarily an accomplice to the crime charged.

3. Whether the right of petitioner, Diane C. Baker, not to give evidence against herself, guaranteed to her by the Fifth and Fourteenth Amendments, was violated by the admission of testimony that she refused to answer questions upon being advised that she had the right to remain silent.

4. Whether petitioners were convicted in violation of Article I, Section 10, of the United States Constitution which prohibits ex post facto laws, or in violation of the due process clause of the Fourteenth Amendment which prohibits vague and uncertain criminal statutes, when the Tennessee Court of Criminal Appeals construed Section 39-1901 of the Tennessee Code Annotated to embrace a conditional and qualified representation made in a negligent or reckless manner, a statutory construction theretofore unknown to Tennessee law and a statutory construction not reasonably to be anticipated by petitioners in governing their conduct.

5. Whether the principle implicit in the Due Process Clause of the Fourteenth Amendment that the prosecution in a criminal case must bear the burden of proving guilt beyond a reasonable doubt was transgressed when the trial court effectively shifted to petitioners the insurmountable burden of proving their innocence by first permitting the State to cross-examine petitioners as to whether they intended calling a particular doctor to testify in their behalf when said doctor under the State's theory was an accomplice to the crime charged and therefore admittedly possessed a constitutional right not to testify, and secondly, by charging the jury as to their being permitted to draw an adverse inference from the failure of a party to call a witness possessing knowledge peculiar to one side, when the said doctor was the only potential witness whose identity was brought to the attention of the jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 10, United States Code XLV:

> No state shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Amendments to the United States Constitution, Article V, United States Code XLVIII:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendments to the United States Constitution, Article VI, United States Code XLVIII:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for ob-

> taining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendments to the United States Constitution, Article XIV, Section I, United States Code XLIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated, Section 39-1901, Vol. 7, 1976 Cumulative Supplement, 19:

> Any person, who, by any false pretense, or by any false token or counterfeit letter, with intent to defraud another, obtains from any person any personal property, services, labor, or the signature of any person to any written instrument, the false making of which is forgery, shall, on conviction, be punished as in case of larceny.
>
> The words "false pretense" include all cases of pretended buying, borrowing, or hiring, bailment or deposit, and all cases of pretended ownership, where the person obtaining possession intended, at the time he received the property, feloniously to steal the same.

Tennessee Code Annotated, Section 39-603, Vol. 7, 89:

> If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished

by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500).

STATEMENT OF THE CASE

The petitioners are two individuals, Thomas E. Cole and Diane C. Baker, and a corporation, Burnco, Incorporated, d/b/a Volunteer Abortion Clinic and Chattanooga Women's Clinic. On September 25, 1975, the Knox County Grand Jury returned three presentments against petitioners. In presentment No. 1106, petitioners were accused of obtaining property (money in the amount of $150.00) by false pretenses in violation of Tennessee Code Annotated 39-1901. In presentments Nos. 1104 and 1105, petitioners were charged with attempting to obtain property ($150.00 in each case) by false pretenses in violation of Tennessee Code Annotated 39-603 and Tennessee Code Annotated 39-1901.

On June 7, 1976, at the conclusion of a six day trial, a jury returned verdicts of guilty against the petitioners in all three cases after deliberating for eighty-two (82) minutes. In case No. 1106, the jury fixed the maximum punishment allowable by law against the petitioner, Thomas E. Cole, the sentence being not less than six (6) years nor more than ten (10) years in the State Penitentiary. In the same case, the jury fixed the punishment of petitioner, Diane C. Baker, at not less than three (3) years nor more than four (4) years in the State Penitentiary. In each of cases No. 1104 and No. 1105, the jury again fixed the maximum punishment allowed by law against petitioner, Thomas E. Cole, the sentence in each case being not less than two (2) years nor more than five (5) years in the

State Penitentiary. In the same cases, the jury fixed the punishment of petitioner, Diane C. Baker, at not less than one (1) year nor more than three (3) years in the State Penitentiary. Because Tennessee Code Annotated 39-1901 does not provide for a fine, the jury assessed no punishment as to the corporate petitioner in case No. 1106. In each of cases No. 1104 and 1105, the jury fixed the maximum fine of Five Hundred Dollars ($500.00) against the corporate petitioner.

Presentment No. 1106 charged that the petitioners on a day in August, 1975, unlawfully, knowingly and by false pretense, with the intent to defraud, did obtain from Glenda Faye Kirklen, the sum of $150.00. More particularly, the presentment charged that the petitioners did falsely, fraudulently and feloniously represent to Glenda Faye Kirklen that she was pregnant and that said pregnancy was confirmed by medical laboratory tests upon a specimen of urine submitted by the said Glenda Faye Kirklen, the said petitioners then and there well knowing said representations were false and fraudulent and that the said Glenda Faye Kirklen was not pregnant at the time they obtained said money from her and that Glenda Faye Kirklen relied on said false pretenses.

Presentments No. 1104 and No. 1105 charged that petitioners on the same day in August, 1975, unlawfully, knowingly and feloniously did attempt to commit the felony of obtaining the personal property of another by means of false pretenses. More particularly, the presentments charged that the petitioners did unlawfully, knowingly, feloniously and by false pretenses with the intent to defraud, obtain from Ida Webb and Tiajuana Tucker (two undercover police women) the sum of $150.00 each by falsely, fraudulently and feloniously representing to them that they were pregnant and that said pregnancies were confirmed by medical

laboratory tests upon specimens of urine submitted by them, the petitioners then and there well knowing said representations were false and fraudulent at the time they obtained said money from them with the intent that they rely on said false pretenses.

The material facts involved are not in dispute. Although there are some inconsistencies in the testimony, there is no real dispute as to the relevant and material evidence when considered in light of the issues of the cases.

On August 6, 1975, Debora Diane Hux went to the Volunteer Abortion Clinic located in Knoxville for the purpose of having a free pregnancy test. She thought she was pregnant, and she desired to take advantage of the Clinic's newspaper ad offering free pregnancy tests. She was accompanied to the Clinic by a friend, Debbie Ballard. The free pregnancy test was done by petitioner, Diane C. Baker. The test consisted of chemical testing of a urine speciman. Miss Hux watched Miss Baker do the actual testing and Miss Hux was even shown the results of the test by petitioner Baker. Upon completion of the test, petitioner Baker told Miss Hux that the test was positive which meant that she was pregnant. In conducting this test, as in all the other tests conducted by petitioner Baker in these cases, she did not attempt to be secretive as to the manner and procedure she followed.

Significantly, in explaining the meaning of the results of the test to Miss Hux, the evidence clearly established that petitioner Baker incorrectly interpreted the meaning of the results of the test. In fact, all of the evidence introduced in these cases clearly shows that petitioner Baker was doing the pregnancy tests improperly, and that as a result of following inappropriate procedures, she was coming up with incorrect or wrong

results. This inescapable conclusion is arrived at by considering the testimony of all the various witnesses who observed and described the methods followed by petitioner Baker and comparing it with the testimony of the various expert witnesses, both for the State and for the petitioners, who explained the nature of the tests and the correct procedures necessary to arrive at a true or correct result and who further explained how various types of deviations from correct procedure could readily render wrong results.

After learning that the test was positive, and after a discussion of the possible ill effects the drugs used by her boy friend might have on an unborn child, and after a discussion of the procedures to be followed in an abortion, the witness, Hux, made an appointment for August 12, 1975, to have an abortion at the Clinic. The witness, Hux, testified she could not remember whether petitioner Baker told her a doctor at the Clinic would make the final diagnosis as to whether she was or was not pregnant. She did admit on cross-examination, however, that she was told a doctor would later give her a pelvic examination.

After leaving the petitioner Clinic, the witness, Hux, and her friend, Debbie Ballard, decided to go to another abortion clinic to verify the pregnancy test by having another free pregnancy test run. Her friend, Debbie Ballard, also had a pregnancy test run at the second abortion clinic. The tests at the second abortion clinic demonstrated neither was pregnant. Both went back to the petitioner clinic, and this time Debbie Ballard asked for and received a free pregnancy test performed by petitioner Baker. The witness, Debbie Ballard, had had a hysterectomy a year prior to this date.

Petitioner Baker also conducted the pregnancy test in the presence of the witness, Ballard. The witness,

Ballard, testified petitioner Baker did not follow the same procedures as the second abortion clinic to which she had just gone to have the test run. After being told by petitioner Baker that the pregnancy test turned out positive, indicating she was pregnant, also scheduled an abortion at the petitioner clinic for August 12, 1975.

After leaving the petitioner clinic the second time, the witnesses, Hux and Ballard, returned a second time to the other abortion clinic to find out who they might contact to tell what happened to them at the petitioner clinic. The second abortion clinic suggested they contact Planned Parenthood or the Medical Association. They could not reach anyone at Planned Parenthood, and the Medical Association told them they could not do anything. They contacted the police department who referred them to the District Attorney General's office. After a consultation with police department officials and members of the District Attorney General's office, these officials decided to send two non-pregnant undercover police women to the petitioner clinic. Neither the witness, Hux, nor the witness, Ballard, had any further connection with the case. They did not go back to the petitioner clinic on the 12th day of August, 1975, for their scheduled abortion procedures.

On August 7, 1975, undercover police woman, Tiajuana Tucker, went to the petitioner clinic posing as a prospective patient, and on August 8, 1975, undercover police woman, Ida Webb, did the same. On each occasion, petitioner Baker conducted the free pregnancy tests. She reported to each woman that the test showed positive, indicating pregnancy. Both undercover agents actually observed the tests being conducted, and their testimony as to the details of how it was being done when compared to the expert testimony of witnesses as to how it should properly be done, clearly show petitioner Baker was doing the tests improperly.

Upon being told that their free pregnancy tests were positive, the two undercover police women scheduled abortion procedures for August 12, 1975, at the petitioner clinic, and on that date the police authorities in conjunction with the office of the District Attorney General sent the two undercover police women to the petitioner clinic. Other police authorities and members of the District Attorney General's office waited outside the clinic with a signed search warrant planning to conduct a raid upon the clinic.

Undercover police woman Ida Webb, wired so that the police on the outside of the clinic could hear and record her conversations, went to the petitioner clinic to keep her scheduled appointment for an abortion. The taped conversation between officer Webb and the doctor who examined her at the clinic was introduced into evidence even though the doctor was not called as a witness. Undercover police woman, Tiajuana Tucker, was later to follow her into the clinic also as a pretended patient. Both women saw the receptionist who gave them some papers to fill out in a folder, and these papers included a medical history form. Both undercover police women falsified the facts contained on the medical history sheets. Both indicated they had missed menstrual periods.

After filling out the required forms, Ida Webb was directed into the business office to pay the $150.00 for the anticipated abortion procedure. This is where she came into contact with the petitioner Cole. After some conversation, she paid him, and he gave her a receipt. Since she appeared nervous and upset, he asked her if she was sure she wanted an abortion, and he directed her to the petitioner Baker, who was on that date acting in the capacity of counseling the women who were scheduled to have abortions.

After talking to petitioner Baker, she eventually was sent downstairs in the clinic where other personnel requested a urine sample which she supplied, and she removed her clothing and dressed in a wrap-around gown. She testified that someone in the lab, whom she could not identify other than by saying she was a tall thin black nurse, took the information as to her blood type and then took her urine sample and poured it into a sink. She was given some pills to calm her nerves, and eventually after prolonged waiting, she went into the procedure room where she met Dr. J. T. Hays, Jr., a licensed Knoxville physician who performed the abortions for the petitioner clinic.

In her testimony describing what she saw and heard during the period of time she spent waiting to go into the procedure room, Ida Webb described matters not relevant or material to the issues involved in the cases but which were obviously elicited from her to prejudice the jury. Over objections of defense counsel, she described moaning and crying of patients, and the removal of glass jars from the procedure room filled with bloody fluid.

When Ida Webb went into the procedure room, she was extremely nervous. She got on the table, and the doctor started examining her. She started talking very fast and very nervously, saying she wanted to know everything that was going to happen and that she did not want them to do anything to her that she was not aware of because she had seen bottles of blood going out of there. The doctor was obviously having some difficulty examining her because he had to request repeatedly that she lie back and relax, and so did the the nurse who was assisting the doctor in the procedure room. While examining her, the doctor said she was about ten weeks pregnant and asked her if she wanted

an abortion. She replied that she had reason to believe that she was not pregnant and stated that she was a police officer. She again asked the doctor if he was sure she was pregnant, and he replied that "The womb's enlarged. You look like it to me." The doctor asked if she were a police officer, and the assisting nurse asked her if she had a warrant. She replied that she was not putting anyone under arrest at that time; whereupon, the doctor stated, "Get on with the work." The doctor performed at least one additional procedure before the clinic was interrupted by the execution of the search warrant referred to earlier. The police and representatives from the District Attorney General's Office searched the premises, seized records from the clinic, photographed the entire clinic, and questioned the patients that were still there. They took only a few of the latter to other doctors for examinations. Among these was Glenda Faye Kirklen, the alleged victim in case No. 1106.

As stated, police woman, Tiajuana Tucker, also went to the clinic on August 12, 1975, pursuant to her appointment for an abortion procedure. She followed the same procedure as Ida Webb, seeing the receptionist, filling out medical forms, paying her money to petitioner Cole, discussing her problem with petitioner Baker, providing the nurse in the laboratory with a urine sample and some blood to ascertain her blood type.

No criminal charges or any type of disciplinary action was ever brought against Dr. Hays who had the ultimate responsibility for determining whether each patient was pregnant and the length of the pregnancy; however, the prosecuting attorney in his final argument inferred that Dr. Hays would be prosecuted if they returned verdicts of guilty against the petitioners.

Testifying for the State, Dr. Glenn Watts said he subsequently examined officer Ida Webb on August 15, 1975. When asked whether a woman could manipulate her body and fool or mislead a physician as to the size of her uterus or as to whether or not she was pregnant, he responded that it was possible, but that a physician should be aware or know whether she is holding her abdominal muscles tight so that he could not properly conduct a bimanual examination. Dr. Watts testified he never relied solely upon a urine pregnancy test, and he admitted that the medical history conveyed by the patient was a factor in the diagnosis and that a pelvic examination was essential.

Another witness for the State, Cathy Philmore, testified that between July 28 and August 2, 1975, she went to the petitioner clinic and had a free pregnancy test. The test was performed by petitioner Baker, and it showed positive although later she discovered she was not pregnant. She admitted she did not pay much attention as to how petitioner Baker conducted the test, and she admitted she was advised by petitioner Baker that the test was not foolproof and that she should probably come back in a couple of weeks and have the test run again.

The alleged victim in case No. 1106, Glenda Faye Kirklen, testified that on August 11, 1975, she feared that she might be pregnant because she was experiencing morning sickness, vomiting, dizziness and she had missed a menstrual period, even though she had previously had her tubes tied several years earlier. She went to the petitioner clinic where petitioner Baker ran a free pregnancy test for her. According to the description of this witness, petitioner Baker conducted the test improperly. After petitioner Baker told her the test was positive for pregnancy, Kirklen told Baker

she had had a tubal procedure, and Baker stated that, of course, there was still a possibility she was pregnant. Kirklen made an appointment for an abortion for the next day. Kirklen followed generally the same procedure as was followed by the two police women on August 12, 1975. Her husband paid petitioner Cole the $150.00 involved. She never got to see the doctor at the clinic because the police raid occurred. She was subsequently examined by a doctor and found not to be pregnant.

The husband of Glenda Faye Kirklen testified that when he talked to petitioner Cole and paid him the $150.00 fee, he raised the issue as to whether there was a chance she was not pregnant because she had had her tubes tied. He admitted that petitioner Cole indicated the doctor who was to subsequently examine her would determine whether she was or was not pregnant. Petitioner Cole assured Mr. Kirklen that he was confident that if she were not pregnant, the doctor would tell him.

In conjunction with executing the search warrant heretofore described, the authorities threatened to take petitioners to jail if they did not make a statement. One officer testified that initially petitioner Baker refused to answer questions upon being advised that she had the right to remain silent. Police officer Charles Coleman testified as follows: "I told Mrs. Baker that I was interested in who had performed the urine analysis on the two officers, and that I had been informed that she did it, and I had asked her where she worked throughout the clinic, and she told me that some days that she was a receptionist and a counselor and some days that she worked downstairs in the laboratory. And I told her at that time that before I asked her any more questions that I should advise her of her

rights. I advised her of her rights and she refused to answer any more questions." (Bill of Exceptions, page 461).

Subsequently, petitioners Baker and Cole went to police headquarters and gave a statement in the presence of their attorney. They denied any wrongdoing to any extent. The statement of petitioner Baker was introduced into evidence, but the statement of petitioner Cole was not introduced, the State claiming it was too lengthy.

The State's last witness was introduced under the pseudonym, Mary Jones. She testified that in July 1975, believing that she was pregnant, she went to the petitioner clinic where she had a free pregnancy test run. The test was conducted by someone in the laboratory other than petitioner Baker. The test proved to be negative. Later, on July 24, 1975, she went back and this time, petitioner Baker conducted the free pregnancy test and reported the test was positive. Mary Jones scheduled an abortion, but when she came to the clinic on the procedure day, she was "spotting." After filling out medical forms, paying her fee, providing another urine sample, she was examined by Dr. Hays in the procedure room, found not to be pregnant, and her money was refunded.

Petitioner Burnco, Incorporated, owned and operated the Volunteer Abortion Clinic in Knoxville, Tennessee, and the Chattanooga Women's Clinic in Chattanooga, Tennessee. The Knoxville clinic had been in operation for one month prior to the described police raid, and there had been only four procedure days on which abortions were performed there. The Chattanooga Women's Clinic had been in operation for four months.

Barbara Sue Short, a witness for the defense, was the president of petitioner Burnco, Incorporated. She

operated and managed both abortion clinics. She was not charged in these cases. Ironically, she escaped indictment and conviction only because of the serious illness of her mother.

Petitioner Thomas E. Cole was a stockholder in the petitioner corporation and held the office of secretary and treasurer for said corporation. Except for the single and critical day of August 12, 1975, petitioner Cole took no part in the actual operation and management of the clinics. On August 11, 1975, the mother of Barbara Sue Short was placed in the intensive care unit of a Chattanooga hospital in critical condition. She notified petitioner Cole who agreed to substitute for her at the Knoxville clinic the next day. The clinics at Knoxville and Chattanooga performed abortion procedures one or two days each week, and the personnel at each clinic were the same except for the doctors who performed the abortions and the receptionists.

Petitioner Diane C. Baker was the receptionist at the Knoxville clinic. She was the only employee at the Knoxville clinic five days a week because, as stated, other employees worked at both clinics only on procedure days. She was hired as a receptionist by Barbara Short about July 17, 1975. After being hired as a receptionist, petitioner Baker was told her duties also included performing free urine pregnancy tests for those who requested them. She was given very limited instructions by Barbara Sue Short for some two days. She was twenty-three years of age and had no prior medical training of any nature. The aforesaid Barbara Sue Short had very limited training herself relative to conducting urine pregnancy tests, and she also had no medical training. The law in Tennessee does not require any type of special training or licensing to perform a urine pregnancy test, and frequently doctors

have non-medical personnel perform such tests in their offices. In fact, abortion clinics in Tennessee are not regulated in any manner or to any extent. Although the urine pregnancy tests appear simple, incorrect results can easily be obtained if the tests are not performed strictly in accordance with proper procedure. Expert medical testimony established that many factors can bring about incorrect results, such as, the age, temperature, purity and amount of the chemicals used, contamination of the slides used, timing of the various stages of the tests, sequence of the different chemicals used, proper stirring and mixing of the chemicals with the urine, and the type of lighting used to observe the chemical reaction and results reached.

During the course of the trial, it was conclusively and very dramatically demonstrated how improper procedures in conducting the urine pregnancy tests could bring about wrong results. Elisa Henderlite, a qualified and properly licensed laboratory technologist testified for the defense. During her testimony, the prosecuting attorney requested and obtained a brief recess. At the recess, he gave a sample of his urine to the said witness for the purpose of conducting a pregnancy test with it. When the test was conducted by following all of the correct procedures necessary, the results quickly indicated negative as to pregnancy. However, when she deviated from the proper procedure by using an incorrect amount of one of the chemicals involved, the test result appeared to be positive with regard to the test run on the male prosecuting attorney.

The evidence established that the abortion clinic involved was operated in a standard fashion as to the procedures followed. Other abortion clinics across the country functioned in the same manner. These standard procedures were as follows: The determination of

the pregnancy of the women who ultimately underwent abortion procedures at the clinic was done in several ways. In some cases, women would be told of their pregnant condition by a physician not connected with the clinic, and they would contact the clinic to arrange for an abortion procedure. In other cases, women who believed they were pregnant would contact the clinic and request a free urine pregnancy test. If their pregnancy test showed positive, and they wanted an abortion, and the information obtained indicated the pregnancy was within the first trimester period, an abortion procedure would be scheduled for a subsequent day. On the procedure day, the patient would come to the clinic, fill out certain forms which included material medical history, pay the required fee, receive a second urine pregnancy test, have their blood type determined, and ultimately be examined by the physician who performed the abortion procedures. The physician performing the abortion procedure at the clinic had the ultimate responsibility of determining whether the patient was pregnant, whether the patient wanted an abortion, and if so, whether the pregnancy was within the first trimester period enabling him to perform the abortion with the limited facilities of a first trimester clinic. Under Tennessee law, pregnancies in the second stage of the trimester period can only be aborted in hospital-certified facilities. Initial pregnancy tests at first trimester abortion clinics are frequently free of charge.

Although a woman pays the fee for an abortion in the initial steps of the procedures followed or on the day she is to have an abortion, this payment is necessarily conditional and qualified in nature. If the physician, who is to perform the abortion at the clinic and who has the ultimate responsibility of determining pregnancy and the stage thereof, should determine that

the patient was not in fact pregnant or that the abortion procedure was not really desired by the patient or that the pregnancy was too far advanced to be permitted by law under such clinical facilities, the patient's money is refunded to her.

On cross-examination of petitioners Cole and Baker, the State was permitted to ask them whether they intended calling Dr. Hays as a witness, and the trial court charged the jury that they were permitted to draw an adverse inference from the failure of a party to call a witness possessing peculiar knowledge to one side. Under the State's theory Dr. Hays was an accomplice to the crime charged and he was the only potential witness whose identity was brought to the attention of the jury. All of this represented a calculated effort to shift the burden of proof to the petitioners.

No contemporaneous objection was made at the trial either to the admission of the doctor's representation of pregnancy of Ida Webb or to the proof of Diane Baker's election to remain silent in the face of police interrogation, or to the effort of the State to shift the burden of proof to petitioners. These matters, however, were the basis of assigned errors in the Court of Criminal Appeals and on petition for certiorari to the Tennessee Supreme Court for the reasons asserted in the present petition. These assigned errors were not rejected on the basis of any failure timely to raise them. The Court of Criminal Appeals rejected the assigned errors presented by the admission of the doctor's declarations and the charge of the Court concerning the failure of a party to call a witness with the general finding that they were without merit. It futher held that the assignment of error based upon proof of petitioner Baker's silence was a subsequent "admission," the logic of which is impossible to follow.

Tennessee law permits appellate courts, in reviewing criminal convictions, to notice fundamental errors although contemporaneous objections are not made at the trial level, *Manning vs. State* 500 S.W.2d 913 (1973). More importantly, however, the claims of petitioners were rejected by the state appellate courts on their merits not because of any procedural infirmity. Petitioners believe, therefore, their federal constitutional claims were properly raised in the State courts.

In both the trial and appellate courts, petitioners have assigned as error the issue of the sufficiency of the evidence and the due process question presented by question one. The Court of Criminal Appeals held that the negligence which was shown by the proof was sufficient to support a conviction of guilt under the statute. The trial court had refused to instruct the jury on the State's theory of negligence. At the conclusion of all the proof, the prosecuting attorney unsuccessfully attempted to persuade the trial judge to charge the jury that if they found the petitioners guilty of gross negligence or reckless conduct relative to the manner in which the pregnancy tests were conducted, the jury should find them guilty of obtaining money under false pretenses.

Not only does the proof demonstrate petitioners were convicted of the offenses charged merely because they were engaged in the controversial field of abortions, the argument of the prosecuting attorney makes the contention conclusive. The following is an excerpt from the State's argument of the case:

> The term that I would use to sum up the last six days that we have had here is "a tragedy." An out and out tragedy. I can parade and I have paraded eight witnesses before this jury, some in the innuendo [*sic.*], some of them using assumed

names. Some even didn't come. I'm sure that this jury will know. We had to deal with them by the color code of their file. And there is a reason for that, ladies and gentlemen of the jury. Because right now in this country the volatile issue that we have is abortion. And there is a reason for that. And reason that it is the most volatile issue that we have right now is that it is the most secretive thing that a man or a woman can have. When a woman becomes or has an unwanted pregnancy, in most cases, that has to be one of the most sensitive times in their life. And why I say that we are dealing with a tragedy in this case is because the Supreme Court ruled, and I submit to the Court, probably properly in *Roan vs. State* [*sic.*, for *Roe vs. Wade*] using anonymous names in the case in 1973, that the right to have an abortion is an issue that is between the woman and her consent with the proper advice of a licensed physician. And I think his Honor might even speak to that at the end of this trial. Therein, ladies and gentlemen of the jury, lies the tragedy of this trial — the consent of the woman and the advice of a licensed physician.

Out of that decision came the Volunteer Abortion Clinic and came the other clinics that we are dealing with in this case. And out of that decision came the tragedy of Knox County, because I can't tell this jury, there is no way that I can put evidence on to this jury as to how many of the women that got on that procedure table and were aborted were not pregnant. You had better believe, ladies and gentlemen of the jury, that there are a lot of single or married women who went to the Volunteer Abortion Clinic and were in very difficult circumstances, had what they believed to

be an abortion, will go through the rest of their life believing that, number one, they were pregnant . . . [here the Attorney General was interrupted by defense counsel's objection and argument thereupon].

As I was saying, ladies and gentlemen of the jury, I suggest to you that there are a lot of women that are reading the newspapers and following this trial very closely.

The first thing they are wondering is — is my name going to come up? The second thing that they must wonder now was — was I pregnant? Was I pregnant? Did I need an abortion? But they will go through their whole life, ladies and gentlemen of the jury — $150.00 sure — that is what we are talking about here. But those women will go through their whole life believing that they were pregnant under the circumstances that they were, and that they aborted that child. And that will be with them, and will be with them all of their life. But I tell you this, and Mr. Flynn [petitioners' trial counsel] has correctly pointed out that we are not trying an abortion case. For if the Volunteer Abortion Clinic abided by, I submit to you, ladies and gentlemen of the jury, the Supreme Court's decision, we would never have had this case today. They had a licensed physician, on the informed consent of the patient, doing their abortions, we wouldn't have these people here.

REASONS FOR GRANTING THE WRIT

1. Question One

Convictions obtained without evidence of the offenses charged are violative of the due process clause of the Fourteenth Amendment to the United States Constitu-

tion. *Shuttlesworth vs. Birmingham* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1965).

Federal constitutional law prohibits a state from singling out abortion for special regulation, *Doe vs. Bolton* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 694 (1973); *Planned Parenthood of Central Missouri vs. Danforth* 428 U.S. 52, 96 S.Ct. 2831. What happened in this criminal prosecution is "special regulation" with a vengeance. The trial was permeated with irrelevant, incompetent and prejudicial matter calculated to arouse prejudices against the petitioners because the subject matter concerned abortion procedures. It is obvious that the law regarding the nature of regulations of first trimester abortion clinics needs greater clarification to protect those engaged in the operation of such clinics and those who seek the services of such clinics.

2. Question Two

Under *Bruton vs. U.S.* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) the extrajudicial statements of a co-defendant implicating a defendant are violative of the Sixth Amendment where the said co-defendant is not a witness in the case and is not subject to cross-examination. The same principles underlying *Bruton* require the exclusion of declarations made by a non-defendant, non-testifying alleged accomplice. This should be true even if the declarations are in the form of a recording when the evidence is introduced as purportedly relevant to the guilt or innocence of the parties on trial.

3. Question Three

In *Doyle vs. Ohio* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), this Court decided the constitutional issue not reached in *U.S. vs. Hale* 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) that introducing into the trial of a case that a criminal defendant refused

to answer questions put to him by the police in reliance upon his rights under the Fifth Amendment was violative of those rights. This case presents the issue of whether such a violation is somehow cured by the fact that the defendent subsequently testifies in the case. The principles underlying *Doyle* clearly indicate the violation is not cured by such procedures.

4. Question Four

A state can no more violate Article 1, Section 10, of the United States Constitution prohibiting ex post facto laws by judicial enlargement of a statute than it can do so by legislative enactment. *Bouie vs. Columbia* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

The interpretation placed on the statute (Tennessee Code Annotated 39-1901) by the Court of Criminal Appeals in order to sustain the convictions of petitioners was rejected by the trial court. Therefore, the case was not even submitted to the jury on the theory sustained by said appellate court. The statute as construed and applied by the Court of Criminal Appeals failed entirely to give fair notice of what conduct was prohibited by said statute. The statute had never been given such a construction before by a Tennessee Court. In fact, the statute had been given a contrary and strict construction. See *Wharton's Criminal Law*, 12th Ed., Vol. 2, Section 1398; *Chaplin vs. U.S.* 157 F.2d 697; *Chapman vs. State* 39 Tennessee 36; *State vs. DeHart* 65 Tennessee 222; *Maulden vs. Tennessee* 73 Tennessee 577; *Millican vs. State* 210 Tennessee 505, 360 S.W.2d 35; *Wallace vs. State* 79 Tennessee 542; *State vs. McDonald* 534 S.W.2d 650; *Estep vs. U.S.* 140 F.2d 40.

5. Question Five

Due process of law within the meaning of the Fourteenth Amendment requires that the prosecution must

prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In Re Winship* 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); *Mullaney vs. Wilbur* 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975).

Attempts by prosecutors to shift the burden of proof by the subtle means of inquiring of a defendant whether he intends calling certain witnesses or by a charge to the jury that certain adverse inferences may be drawn from the failure of a party to call a witness should be held just as violative of due process of law as a direct and less disguised shifting of the burden of proof. *Leary vs. U.S.* 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969).

CONCLUSION

For the reasons set forth herein the petitioners request this Court to reverse the decision of the Court of Criminal Appeals of the State of Tennessee and remand the cause to said Court with instructions to set aside the convictions of the petitioners and grant them a new trial.

Respectfully submitted,

LEROY PHILLIPS, JR. AND
BARBARA W. SIMS
619 Cherry Street
Chattanooga, Tennessee 37402
Counsel for Petitioners

APPENDIX A

State of Tennessee
Court of Criminal Appeals,
Eastern Division, at Knoxville

BURNCO, INC., d/b/a VOLUNTEER ABORTION CLINIC & CHATTANOOGA WOMEN'S CLINIC *(Appellant)*	CCA No. 445 Knox County
vs.	Offense: Attempt to Commit the Felony of Obtaining Money by False Pretense
STATE OF TENNESSEE *(Appellee)*	AFFIRMED No. C1104 Below

JUDGMENT

Came the Appellant Burnco, Inc., d/b/a Volunteer Abortion Clinic & Chattanooga Women's Clinic by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be *affirmed*, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the Appellant, for its offense of Attempt to Commit the Felony of Obtaining Money by False Pretense, shall pay a fine of Five Hundred ($500.00) Dollars.

The Appellant will pay the costs of the cause accrued

in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

In the event the Appellant files a petition for certiorari in the Tennessee Supreme Court, it may be admitted to bail on bond in the penalty of $2,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for its appearance in the Supreme Court.

Mark A. Walker, P.J.
Joe D. Duncan, J.
John K. Byers, J.

FELONY — Affirmed

State of Tennessee
Court of Criminal Appeals,
Eastern Division, at Knoxville

BURNCO, INC., d/b/a VOLUNTEER ABORTION CLINIC & CHATTANOOGA WOMEN'S CLINIC *(Appellant)*	CCA No. 445 Knox County
vs.	Offense: Attempt to Commit the Felony of Obtaining Money by False Pretense
STATE OF TENNESSEE *(Appellee)*	AFFIRMED No. C1105 Below

JUDGMENT

Came the Appellant Burnco, Inc., d/b/a Volunteer Abortion Clinic & Chattanooga Women's Clinic by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be *affirmed*, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the Appellant, for its offense of Attempt to Commit the Felony of Obtaining Money by False Pretense, shall pay a fine of Five Hundred ($500.00) Dollars.

The Appellant will pay the costs of the cause accrued

in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

In the event the Appellant files a petition for certiorari in the Tennessee Supreme Court, it may be admitted to bail on bond in the penalty of $2,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for its appearance in the Supreme Court.

Mark A. Walker, P.J.
Joe D. Duncan, J.
John K. Byers, J.

FELONY — Affirmed

State of Tennessee
Court of Criminal Appeals,
Eastern Division, at Knoxville

BURNCO, INC., d/b/a VOLUNTEER ABORTION CLINIC & CHATTANOOGA WOMEN'S CLINIC *(Appellant)*	CCA No. 445 Knox County
vs.	Offense: Obtaining a Sum of Money in Excess of $100.00 by False Pretense
STATE OF TENNESSEE *(Appellee)*	AFFIRMED No. C1106 Below

JUDGMENT

Came the Appellant Burnco, Inc., d/b/a Volunteer Abortion Clinic & Chattanooga Women's Clinic by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be *affirmed*, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the Appellant, for its offense of Obtaining a Sum of Money in Excess of $100.00 by False Pretense will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this

Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

In the event the Appellant files a petition for certiorari in the Tennessee Supreme Court, it may be admitted to bail on bond in the penalty of $1,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for its appearance in the Supreme Court.

Mark A. Walker, P.J.
Joe D. Duncan, J.
John K. Byers, J.

FELONY — Affirmed

APPENDIX B

State of Tennessee
Court of Criminal Appeals,
Eastern Division, at Knoxville

DIANE C. BAKER
(Appellant)

vs.

STATE OF TENNESSEE
(Appellee)

CCA No. 445
Knox County

Offense:
Attempt to
Commit the Felony
of Obtaining Money
by False Pretense

AFFIRMED
No. C1104 Below

JUDGMENT

Came the Appellant Diane C. Baker, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be *affirmed*, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the Appellant, for her offense of Attempt to Commit the Felony of Obtaining Money by False Pretense be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at *hard labor* for a term of not more than Three (3) years, and

not less than One (1) year, commencing on the day of her reception at said penitentiary. It is further ordered by the Court that Appellant is disqualified from holding office under this State. This sentence is to run concurrent with the sentence in Knox Criminal Case No. C1106.

The sentence of imprisonment will be credited with the time the Appellant spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

The Appellant will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the Appellant to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the Appellant files a petition for certiorari in the Tennessee Supreme Court, she may be admitted to bail on bond in the penalty of $3,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for her appearance in the Supreme Court; and in default of such bond she will be remanded to the Sheriff of Knox County.

Mark A. Walker, P.J.
Joe D. Duncan, J.
John K. Byers, J.

FELONY — Affirmed

State of Tennessee
Court of Criminal Appeals,
Eastern Division, at Knoxville

DIANE C. BAKER
(Appellant)

vs.

STATE OF TENNESSEE
(Appellee)

CCA No. 445
Knox County

Offense:
Attempt to Commit the Felony of Obtaining Money by False Pretense

AFFIRMED
No. C1105 Below

JUDGMENT

Came the Appellant Diane C. Baker, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be *affirmed*, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the Appellant, for her offense of Attempt to Commit the Felony of Obtaining Money by False Pretense be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at *hard labor* for a term of not more than Three (3) years, and

not less than One (1) year, commencing on the day of her reception at said penitentiary. It is further ordered by the Court that Appellant is disqualified from holding office under this State. This sentence is to run concurrent with the sentence in Knox Criminal Case No. C1106.

The sentence of imprisonment will be credited with the time the Appellant spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

The Appellant will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the Appellant to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the Appellant files a petition for certiorari in the Tennessee Supreme Court, she may be admitted to bail on bond in the penalty of $3,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for her appearance in the Supreme Court; and in default of such bond she will be remanded to the Sheriff of Knox County.

Mark A. Walker, P.J.
Joe D. Duncan, J.
John K. Byers, J.

FELONY — Affirmed

State of Tennessee
Court of Criminal Appeals,
Eastern Division, at Knoxville

DIANE C. BAKER
(Appellant)

vs.

STATE OF TENNESSEE
(Appellee)

CCA No. 445
Knox County

Offense:
Obtaining a Sum of Money in Excess of $100.00 by False Pretense

AFFIRMED
No. C1106 Below

JUDGMENT

Came the Appellant Diane C. Baker, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be *affirmed*, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the Appellant, for her offense of Obtaining a Sum of Money in Excess of $100.00 by False Pretense be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at *hard labor* for a term of not more than Four (4) years, and

not less than Three (3) years commencing on the day of her reception at said penitentiary. It is further ordered by the Court that Appellant is disqualified from holding any office under this State.

The sentence of imprisonment will be credited with the time the Appellant spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

The Appellant will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the Appellant to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the Appellant files a petition for certiorari in the Tennessee Supreme Court, she may be admitted to bail on bond in the penalty of $24,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for her appearance in the Supreme Court; and in default of such bond she will be remanded to the Sheriff of Knox County.

Mark A. Walker, P.J.
Joe D. Duncan, J.
John K. Byers, J.

FELONY — Affirmed

APPENDIX C

State of Tennessee
Court of Criminal Appeals,
Eastern Division, at Knoxville

THOMAS E. COLE
(Appellant)

vs.

STATE OF TENNESSEE
(Appellee)

CCA No. 445
Knox County

Offense:
Attempt to Commit the Felony of Obtaining Money by False Pretense

AFFIRMED
No. C1104 Below

JUDGMENT

Came the Appellant Thomas E. Cole, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be *affirmed*, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the Appellant, for his offense of Attempt to Commit the Felony of Obtaining Money by False Pretense be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at *hard labor* for a term of not more than Five (5) years, and

not less than Two (2) years, commencing on the day of his reception at said penitentiary. It is further ordered by the Court that Appellant is disqualified from holding any office under this State. This sentence is to run concurrent with the sentence in Knox Criminal Case No. C1106.

The sentence of imprisonment will be credited with the time the Appellant spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

The Appellant will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the Appellant to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the Appellant files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $5,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for his appearance in the Supreme Court; and in default of such bond he will be remanded to the Sheriff of Knox County.

Mark A. Walker, P.J.
Joe D. Duncan, J.
John K. Byers, J.

FELONY — Affirmed

State of Tennessee
Court of Criminal Appeals,
Eastern Division, at Knoxville

THOMAS E. COLE
(Appellant)

vs.

STATE OF TENNESSEE
(Appellee)

CCA No. 445
Knox County

Offense:
Obtaining a Sum of Money in Excess of $100.00 by False Pretense

AFFIRMED
No. C1105 Below

JUDGMENT

Came the Appellant Thomas E. Cole, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be *affirmed*, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the Appellant, for his offense of Obtaining a Sum of Money in Excess of $100.00 by False Pretense be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at *hard labor* for a term of not more than Five (5) years, and

not less than Two (2) years, commencing on the day of his reception at said penitentiary. It is further ordered by the Court that Appellant is disqualified from holding any office under this State. This sentence is to run concurrent with the sentence in Knox Criminal Case No. C1106.

The sentence of imprisonment will be credited with the time the Appellant spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

The Appellant will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the Appellant to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the Appellant files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $5,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for his appearance in the Supreme Court; and in default of such bond he will be remanded to the Sheriff of Knox County.

Mark A. Walker, P.J.
Joe D. Duncan, J.
John K. Byers, J.

FELONY — Affirmed

State of Tennessee
Court of Criminal Appeals,
Eastern Division, at Knoxville

THOMAS E. COLE
(Appellant)

vs.

STATE OF TENNESSEE
(Appellee)

CCA No. 445
Knox County

Offense:
Obtaining a Sum of Money in Excess of $100.00 by False Pretense

AFFIRMED
No. C1106 Below

JUDGMENT

Came the Appellant Thomas E. Cole, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be *affirmed*, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the Appellant, for his offense of Obtaining a Sum of Money in Excess of $100.00 by False Pretense be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at *hard labor* for a term of not more than Ten (10) years, and

not less than Six (6) years, commencing on the day of his reception at said penitentiary. It is further ordered by the Court that Appellant is disqualified from holding any office under this State.

The sentence of imprisonment will be credited with the time the Appellant spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

The Appellant will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the Appellant to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the Appellant files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $35,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for his appearance in the Supreme Court; and in default of such bond he will be remanded to the Sheriff of Knox County.

Mark A. Walker, P.J.
Joe D. Duncan, J.
John K. Byers, J.

FELONY — Affirmed

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

JANUARY 1977

BURNCO, INC., THOMAS E. COLE, AND DIANE C. BAKER, *Appellants,*	No. 445 KNOX CRIMINAL Honorable Richard R. Ford, Judge
vs.	
STATE OF TENNESSEE, *Appellee*	(Attempt to commit a felony; obtaining money by false pretense)

FOR THE APPELLANTS:

Leroy Phillips, Jr.
Chattanooga, Tennessee

FOR THE APPELLEE:

Brooks McLemore
Attorney General
Nashville, Tennessee

David L. Raybin
Assistant
Attorney General
Nashville, Tennessee

Herbert S. Moncier
Randall Nichols
Assistant District
Attorneys General
Knoxville, Tennessee

JUDGMENTS AFFIRMED

MARK A. WALKER, PRESIDING JUDGE

OPINION FILED:
JULY 1, 1977

OPINION

The central question presented by this appeal is whether appellants' operation of a sham abortion clinic whereby they incorrectly diagnosed their victims as being pregnant and then charged them a fee for performing an "abortion" is conduct amounting to the offense of false pretenses.

Appellants were each convicted in two cases of attempted false pretenses and one case of the completed crime. Burnco was fined a total of $1000. Cole received two sentences of two to five years and a six- to 10-year term while Baker received two sentences of one to three years and a three- to four-year term with all sentences ordered to run concurrently.

On August 6, 1975, following two complaints, Knoxville police sent undercover agent Ida Webb to the Volunteer Abortion Clinic, which is owned by Burnco. Webb was greeted and asked by Baker whether she wanted the free pregnancy test as advertised by the clinic in the local newspapers. When Webb replied in the affirmative, Baker asked for and received her urine sample. Baker ran a slide test on the sample, declared Webb pregnant and scheduled her abortion for August 12.

The other victims in this case, Glenda Kelly and policewoman Tiajuana Tucker Wilson, reported similar experiences with Baker. These three women were not actually pregnant, however. In all, Baker incorrectly diagnosed seven women as being pregnant.

Webb, Kelly and Wilson returned to the clinic on August 12. They were charged $150 for their upcoming abortion, which they paid to Cole who was Burnco's secretary-treasurer. Webb was given a pelvic examination by the examining physician who stated that Webb

was ten weeks' pregnant. Webb alerted the police, who raided the clinic and arrested Baker and Cole.

Diagnostician Baker had no medical training at all. Hired initially as a receptionist, she was shown the mechanics of performing a slide test for pregnancy only three times before she began performing these tests on the clinic's patients. Her instructor, Barbara Short, Burnco's president and general manager, also had no medical training. Baker did not understand the theoretical principles underlying the test nor did she ever read the instructions that came with the test kit. Moreover, Baker never performed her tests using chemical controls nor did she interpret the test results under a high fluorescent light. Expert medical testimony criticized these omissions.

Furthermore, Baker scheduled abortions on the basis of the test alone. She made no further examination for pregnancy. She told Wilson that the results of her slide test indicated a pregnancy between eight and ten weeks. Expert medical testimony criticized these practices by stating that abortions should not be scheduled on the basis of a slide test alone, and that slide tests cannot determine the length of pregnancy. Finally, Baker knew that the slide test was inaccurate because she had once incorrectly diagnosed herself as being pregnant.

Appellants contest the sufficiency of the evidence on a number of grounds. First, they argue that they obtained their victims' money pursuant to a promise to perform an abortion and that false promises are not within the crime of false pretenses. They overlook the dependency of the false promise upon the false representation of pregnancy, a misstatement of present fact that brings this scheme within the offense. *Cook v. State*, 170 Tenn. 245, 94 S.W.2d 386 (1936). They

further argue that pregnancy is only a medical opinion and not a fact, although pregnancy is as much a fact as the person that results from it. Moreover, misrepresentations of specific health problems are actionable under false pretenses. *Bowen v. State*, 68 Tenn. 45 (1876). Appellants say that Baker had no knowledge that her diagnoses were false and that she was only negligent in reporting the results of her tests and consequently lacked criminal intent. The knowledge requirement for the crime of false pretenses is satisfied if the state shows either the defendent actually knows that his statements are false or makes his statements recklessly. *People v. Schmitt*, 155 C.A.2d. 87, 317 P.2d 673 (1957); *State v. Paxton*, Kan., 440 P.2d 650 (1968); *State v. McFarland*, 180 N.C. 726, 105 N.E. 179 (1920). A reckless statement is made when the defendent knows he does not know that the statement is true or false regardless of the reasonableness of the belief. LaFave and Scott, *Criminal Law*, Sec. 90 (1972).

Baker had incorrectly diagnosed herself as being pregnant. Consequently, she knew that the test was not always accurate. Despite this knowledge, she unqualifiedly represented to her victims that they were pregnant on the basis of the test. Her representation of the test's accuracy when she knew that the test was inaccurate was, at a minimum, reckless. In addition, her statement to Wilson that the test showed her to be between eight and ten weeks' pregnant, when all evidence showed that the test could never determine the length of pregnancy, was also reckless.

Cole argues that he made no false statements nor aided and abetted. However, Cole explained the abortion procedure to the victims, thus reinforcing their belief that they were in a legitimate abortion clinic. In addition, he took their money from them, thus satisfying an essential element of false pretenses. *State*

v. McDonald, Tenn., 534 S.W.2d 650 (1976). From these facts, the jury was warranted in finding that he aided and abetted. Contrary to Cole's assertion, there is no requirement that an aider and abettor be present at every stage of a fraudulent scheme. Consequently, Cole's absence during Baker's representations is immaterial. See *Beck v. State*, 203 Tenn. 671, 315 S.W.2d 254 (1958).

Appellants argue that they obtained their victims' money on a conditional basis only, subject to a refund if the examining physician determined that they were not pregnant. There is no factual basis for such an assertion especially where the examining physician wrongfully diagnosed Webb as being pregnant. In any event, restitution is not a defense to false pretenses. *Mullican v. State*, 210 Tenn. 505, 360 S.W.2d 35 (1962). We note that Webb and Wilson never relied upon Baker's representations, hence as to them appellants were properly convicted only of the attempted crime. LaFave and Scott, *Criminal Law*, Sec. 90 (1972). Kelly did rely upon Baker's diagnosis, hence appellants were properly convicted of the completed crime.

Appellants argue that the court erred in permitting photographs that showed the interior of the clinic and by excluding evidence showing the operation of Brunco's clinic in Chattanooga.

The control of evidence is largely within the discretion of the trial judge. *Anderson v. State*, Tenn.Cr.App., 512 S.W.2d 665 (1974). In fraud cases, any evidence bearing on the defendant's intent is admissible, since intent is the gravamen of these offenses. *Rafferty v. State*, 91 Tenn. 655, 16 S.W. 728 (1891); Underhill's Criminal Evidence, Sec. 788, 5th Ed. (1957). ("All available information should be received . . .") The photographs showed that the clinic was operated in a casual and unprofessional manner. For example,

pregnancy tests kits were stored in a refrigerator that contained soft drinks, bloodstains were located on a sink cabinet and bean bags were used in lieu of chairs. Tested by the rule that favors admissibility, the evidence was proper. See, e.g., *Freshwater v. State*, 2 Tenn.Cr.App. 314, 453 S.W.2d 446 (1969). On the other hand, the evidence detailing the operation of the Chattanooga clinic was properly refused. Neither Cole or Baker worked at this clinic, hence this evidence could bear little, if any, upon their intent. Moreover, the trial judge restricted both prosecution and defense on this point. We find no abuse of discretion.

Appellants argue that the "rule" was violated when Webb was permitted to hear the testimony of other witnesses. These witnesses testified to events at the clinic that occurred some time prior to Webb's investigation. Since Webb's testimony did not coincide with the other witnesses' testimony, there was no prejudice to appellants. *Nash v. State*, Tenn.Cr.App., 524 S.W.2d 494 (1975).

Appellants argue that the prosecution referred to Baker's postarrest silence. Any error here was cured by Baker's subsequent admissions to police investigators a short time following her arrest. *Parks v. State*, Tenn. Cr.App., 543 S.W.2d 855 (1976).

Appellants have alleged error in the verdict, closing argument, jury instructions and the admission of hearsay. We have carefully considered these assignments and find them to be without merit.

The judgments are affirmed.

Mark A. Walker, Presiding Judge

CONCUR:

Joe D. Duncan, Judge
John K. Byers, Judge

APPENDIX E

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

BURNCO, INC., d/b/a VOLUNTEER ABORTION CLINIC and CHATTANOOGA WOMEN'S CLINIC and THOMAS E. COLE and DIANE C. BAKER,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondents.

Knox Criminal No. 445

ORDER

Upon consideration of the petition for certiorari and reply thereto, briefs of counsel and the entire record in the cause, the Court is of the opinion that the petition for certiorari should be and the same hereby is denied at the cost of the petitioner.

PER CURIAM